

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

LAURA ALLEN, INDIVIDUALLY; And As
ADMINISTRATRIX OF THE ESTATE
OF DANIEL ALLEN; And AS NEXT FRIEND
OF TAYLOR ALLEN AND DANIELLE
ALLEN; And MARK ALLEN,

Plaintiffs;

v.

MARTIN SURFACING, A Division of
SOUTHWEST RECREATIONAL
INDUSTRIES; SOUTHWEST
RECREATIONAL INDUSTRIES, INC., d/b/a
MARTIN SURFACING,

Defendants.

CIVIL ACTION
No.: 05-40048-FDS

**ANSWER AND JURY CLAIM OF THE DEFENDANTS, SOUTHWEST
RECREATIONAL INDUSTRIES, INC. d/b/a MARTIN SURFACING TO THE
PLAINTIFFS' THIRD AMENDED COMPLAINT**

Now come the Defendants, Southwest Recreational Industries, Inc. d/b/a Martin Surfacing (hereinafter "Defendants") and answers the Plaintiffs' Third Amended Complaint paragraph by paragraph as follows:

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a claim upon which relief can be granted and must be dismissed pursuant to Rule 12(b)(6) of the Massachusetts Rules of Civil Procedure.

SECOND AFFIRMATIVE DEFENSE

By way of affirmative defense, the Defendants answer the Complaint paragraph by paragraph as follows:

INTRODUCTION

1. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

2. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

3. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

4. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

5. Based upon information and belief the Defendants admit this allegation.

6. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

7. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

8. Based upon information and belief the Defendants admit this allegation.

9. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore call upon the Plaintiff to prove these allegations.

10. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore call upon the Plaintiff to prove these allegations.

11. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

12. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

13. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

14. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

15. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore denies said allegations.

16. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

17. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

18. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

19. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

20. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

21. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

22. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

23. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

24. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

25. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

26. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

27. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT ONE
General Negligence Claim

28. The Defendants repeat and reallege its answers to paragraphs 1 through 27 as if expressly set forth herein.

29. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

30. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

31. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

32. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

33. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

34. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT TWO
Negligent Failure to Warn

35. The Defendants repeat and reallege its answers to paragraphs 1 through 34 as if expressly set forth herein.

36. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

37. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

38. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

39. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

40. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

41. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

42. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

43. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

44. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

45. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

46. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

47. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT THREE

Loss of Consortium and for Other Relief Available under G.L. c. 229

48. The Defendants repeat and reallege its answers to paragraphs 1 through 47 as if expressly set forth herein.

49. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

50. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

51. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

52. The Defendants are without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph of the Complaint and therefore deny said allegations.

53. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

54. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT FOUR
Conscious Pain and Suffering

55. The Defendants repeat and reallege its answers to paragraphs 1 through 54 as if expressly set forth herein.

56. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT FIVE
Wrongful Death Caused by Grossly Negligent Conduct

57. The Defendants repeat and reallege its answers to paragraphs 1 through 56 as if expressly set forth herein.

58. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

59. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT SIX
Violation of M.G.L. c. 93A

60. The Defendants repeat and reallege its answers to paragraphs 1 through 59 as if expressly set forth herein.

61. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

62. The Defendants admit the allegations set forth in this paragraph of the Plaintiff's Complaint.

63. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

64. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT SEVEN
Wrongful Conduct

65. The Defendants repeat and reallege its answers to paragraphs 1 through 64 as if expressly set forth herein.

66. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

67. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

68. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

69. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

70. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

71. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

72. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

73. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

74. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

75. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT EIGHT
Strict Liability

76. The Defendants repeat and reallege its answers to paragraphs 1 through 75 as if expressly set forth herein.

77. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

78. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

79. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

80. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

81. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

82. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT NINE
Breach of Express Warranty

83. The Defendants repeat and reallege its answers to paragraphs 1 through 82 as if expressly set forth herein.

84. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

85. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

86. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

87. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

88. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

89. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT TEN
Breach of Implied Warranty

90. The Defendants repeat and reallege its answers to paragraphs 1 through 89 as if expressly set forth herein.

91. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

92. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

93. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

94. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

95. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT ELEVEN
Negligent Infliction of Emotional Distress

96. The Defendants repeat and reallege its answers to paragraphs 1 through 95 as if expressly set forth herein.

97. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

98. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

99. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT TWELVE
Intentional Infliction of Emotional Distress

100. The Defendants repeat and reallege its answers to paragraphs 1 through 99 as if expressly set forth herein.

101. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

102. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

103. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

COUNT THIRTEEN

Defective Design, Manufacturing and Distribution

104. The Defendants repeat and reallege its answers to paragraphs 1 through 103 as if expressly set forth herein.

105. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

106. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

107. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

108. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

109. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

110. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

111. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

112. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

113. The Defendants deny the allegations set forth in this paragraph of the Plaintiff's Complaint.

WHEREFORE, the Defendants deny the Plaintiff is entitled to judgment in any amount or kind.

THIRD AFFIRMATIVE DEFENSE

By way of affirmative defense, the Defendants state that the action was not brought in accordance with and within the applicable statute of limitations.

FOURTH AFFIRMATIVE DEFENSE

The Defendants state that the injuries or damage alleged were caused in whole or in part, by the Plaintiff's decedent's own negligence.

FIFTH AFFIRMATIVE DEFENSE

The Plaintiff's decedent either was guilty of comparative negligence to such a degree as to bar recovery, or in the alternative, any recovery must be reduced proportionately with his comparative negligence.

SIXTH AFFIRMATIVE DEFENSE

The Plaintiff's decedent was negligent, which negligence was greater than the Defendant's negligence, and therefore the Plaintiff is not entitled to recover.

SEVENTH AFFIRMATIVE DEFENSE

The claims arising out of the subject matter of the transactions and occurrences alleged were the result of the risks assumed by the Plaintiff's decedent.

EIGHTH AFFIRMATIVE DEFENSE

If the Defendant(s) negligently injured the Plaintiff as alleged in the complaint, which the Defendant(s) denies, the Plaintiff's decedent was guilty of contributory negligence in that he negligently failed to exercise due care for his own safety.

NINTH AFFIRMATIVE DEFENSE

The Plaintiff's decedent either was guilty of comparative negligence to such a degree as to bar recovery, or in the alternative, any recovery must be reduced proportionately with his comparative negligence.

TENTH AFFIRMATIVE DEFENSE

The Plaintiff's decedent was negligent, which negligence was greater than the Defendants' negligence, and therefore the Plaintiff is not entitled to recover.

ELEVENTH AFFIRMATIVE DEFENSE

The claims arising out of the subject matter of the transactions and occurrences alleged were the result of unreasonable use of the alleged product(s) by the Plaintiff's decedent.

TWELFTH AFFIRMATIVE DEFENSE

The Defendants rely upon such other and further defenses as may become available to it during discovery in this action.

THIRTEENTH AFFIRMATIVE DEFENSE

The risks associated with the product(s) were not reasonably foreseeable at the time of the sales, therefore the Plaintiff is not entitled to recover for any injuries sought based upon an implied warranty of merchantability for failure to warn.

FOURTEENTH AFFIRMATIVE DEFENSE

By way of affirmative defense the Defendants state that there was no available, feasible design alternative for the product(s) alleged to have caused the Plaintiff's decedent's injuries.

FIFTEENTH AFFIRMATIVE DEFENSE

By way of affirmative defense, the Defendants state that the Plaintiff is barred from recovery pursuant to M.G.L. c. 231, §6D.

WHEREFORE, the Defendants deny that the Plaintiff is entitled to have judgment entered in its behalf in any amount including, but not limited to, property damages,

compensatory damages, multiple damages, punitive damages, exemplary damages, emotional distress, and any other relief.

JURY CLAIM

**THE DEFENDANT HEREBY DEMANDS A TRIAL BY JURY AS TO ALL
ISSUES PROPERLY TRIABLE.**

Dated: June 5, 2006

Respectfully submitted,
The Defendants,
Southwest Recreational Industries,
Inc. d/b/a Martin Surfacing

/s/ Michael L. Mahoney

Michael L. Mahoney
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52 Temple Place, 4th Floor
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CERTIFICATE OF SERVICE

I, Michael L. Mahoney, hereby certify that I have served a true copy of the within document this 5th day of June, 2006 via facsimile and first class mail, postage prepaid upon the following:

Michael R. Hugo, Esq.
Lopez Hodes Restaino Milman & Skikos
95 Commercial Wharf
Boston, MA 02110

/s/ Michael L. Mahoney

Michael L. Mahoney